

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

JERSEY CENTRAL POWER & LIGHT COMPANY,
Appellant,

vs.

BOARD OF PUBLIC UTILITIES OF THE STATE
OF NEW JERSEY,
Appellee.

On Appeal from the Superior Court of New Jersey,
Appellate Division

**MOTION OF APPELLEE BOARD OF PUBLIC UTILITIES
OF THE STATE OF NEW JERSEY TO DISMISS
OR AFFIRM**

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The Appellee Board of Public Utilities of the State of New Jersey respectfully moves pursuant to Rule 16.1(b) and (d) to dismiss this appeal or for summary affirmance of the judgment of the Superior Court of New Jersey, Appellate Division on the grounds that the decision below was manifestly correct and does not present substantial constitutional questions in need of further argument.

Counter-Statement of the Case

The Appellant, Jersey Central Power & Light Company (Jersey Central), is a public utility of the State of New Jersey subject to the jurisdiction of the New Jersey Board of Public Utilities (Board) pursuant to N.J.S.A. 48:1-1 *et seq.* Jersey Central, a subsidiary of General Public Utilities Corporation (GPU), is owner of a 25% undivided interest in the Pennsylvania nuclear generating facility known as Three Mile Island (TMI).

On March 28, 1979 an accident at the TMI generating station, Unit No. 2 (TMI-2) rendered that unit inoperable. An undamaged companion unit, TMI Unit No. 1 (TMI-1), which was shutdown for refueling at the time of the accident, has been prevented from resuming generation by order of the Federal Nuclear Regulatory Commission (NRC) pending a complete review of such matters as unit design, operator qualifications, managerial competence and emergency procedures. Since the March 28, 1979 incident and the resultant loss of TMI generating capacity, Jersey Central has been before the Board in a succession proceedings seeking various forms of rate relief related to the TMI outage.

One of Jersey Central's earliest TMI-related filings was a May 4, 1979 petition seeking approval of an adjustment to its Levelized Energy Adjustment Clause (LEAC)* reflecting costs associated with the emergency purchase of TMI replacement energy. On June 18, 1979, the Board permitted Jersey Central a \$74.5 million per year LEAC

*LEAC is a regulatory process used to adjust consumer rates as a result of fluctuations in fuel costs. A constant LEAC charge is based upon the utility's estimated prospective average 12 month energy costs. This charge is subject to earlier adjustment in the event overrecoveries or underrecoveries are experienced.

adjustment. In its Order granting this adjustment, the Board removed from Jersey Central's base rates capital and operating costs associated with the damaged and non-generating TMI-2 unit. The Board reasoned that inasmuch as such unit was not expected to return to service in the reasonably foreseeable future, the imposition of TMI-2 capital and operating costs upon ratepayers along with replacement energy costs would create an impermissible double burden upon customers served by Jersey Central. The capital and operating costs associated with the idle, but undamaged, TMI-1 unit were retained in Jersey Central's base rates, however, in the expectation that such unit would be capable of resuming generation by the end of 1979. Jersey Central did not appeal the Board's order removing TMI-2 from the company's base rates.

On April 1, 1980, when TMI-1 had still not returned to service the Board reconsidered the ratemaking status of that unit. Finding that prospects for the return of TMI-1 to service were more remote than had originally been anticipated, the Board removed the capital and operating costs associated with TMI-1 from Jersey Central's base rates. In order to avoid any adverse impact upon Jersey Central's cash flow, however, the Board simultaneously permitted an acceleration in Jersey Central's recovery of a deferred energy balance* in an amount sufficient to offset the TMI-1 reduction in rates. As a result of the acceleration, no actual reduction in rates occurred. On April 11, 1980, Jersey Central appealed the removal of TMI-1 from its base rates to the Appellate Division of New Jersey's Superior Court (Appellate Division). The Supreme Court

* "Deferred energy balance" refers to those unrecovered energy costs accumulated due to short falls in prior fuel clause adjustments. Jersey Central had been previously authorized by the Board to amortize these costs over a 22 year period.

of New Jersey certified the appeal to itself prior to decision by the Appellate Division.

Jersey Central argued before the Supreme Court of New Jersey that the Board had erred in removing TMI-1 from rate base and had failed to properly take into consideration the impact of such removal on investor interests. On April 8, 1981, the Supreme Court of New Jersey unanimously affirmed the Board's removal of TMI-1 from Jersey Central's rate calculation, as well as the Board's simultaneous acceleration of the company's deferred energy account. *In re Jersey Central Power & Light Co. Petition*, 85 N.J. 520, 428 A.2d 498 (1981). In light of the uncertainty associated with the future availability of TMI generation, New Jersey's highest court held that the Board had properly found TMI-1 to be no longer used and useful in the public service and had, therefore, properly removed such unit from Jersey Central's rate calculation. The Court further noted that the TMI exclusion was necessary "in order to protect JCP & L's ratepayers from continuing to shoulder a double financial burden as to . . . substitute power for an indefinite period of time." 85 N.J. at 531, 428 A.2d at 503. The Court further approved the Board's acceleration of the deferred energy balance as an "innovative" and . . . mutually fair interim solution to a critical problem well within the broad jurisdiction vested in the Board . . ." 85 N.J. at 532, 428 A.2d at 504. Jersey Central did not petition this Court for review of such decision.

Jersey Central's instant application to this Court arises out of four TMI-related orders issued by the Board subsequent to the New Jersey Supreme Court's affirmance of the original TMI rate based exclusion. Two of the orders involved, one dated July 31, 1981 (JCA-70)* and one

* "JCA" references are to the separate appendix submitted by Appellant Jersey Central with its Jurisdictional Statement.

dated July 22, 1982 (JCA-83), established new rates for Jersey Central and continued the TMI exclusion. In a consolidated proceeding before the Appellate Division, Jersey Central appealed both of these Board orders on the theory that *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944), requires that the Board either return TMI to Jersey Central's rate base or, in the alternative, allow Jersey Central's investors a compensatory rate of return offsetting the continued TMI exclusion.

Also before the Appellate Division in the same consolidated proceeding were challenges by the New Jersey Public Advocate to Board orders permitting continued recovery from ratepayers of TMI replacement energy costs as well as a portion of TMI decontamination costs. One order, dated April 23, 1981, denied a motion by the Public Advocate seeking a moratorium on all future Jersey Central rate relief and a Board investigation into the extent to which Jersey Central may have been responsible for the accident at TMI (JCA-105). A second order, dated September 2, 1982, related to a further LEAC increase reflecting TMI replacement energy. Finally, the Public Advocate challenged a Board determination to pass on TMI decontamination costs to ratepayers without a prior Board inquiry into TMI culpability (JCA-98).

On July 28, 1983, the Appellate Division unanimously affirmed all of the challenged orders as proper exercises of the Board's discretionary ratemaking authority (JCA-3). On August 17, 1983 Jersey Central filed a Notice of Appeal and Notice of Petition for Certification with the Supreme Court of New Jersey. On December 6, 1983, the New Jersey Supreme Court dismissed the notice of appeal and denied the petition for certification. On March 5, 1984, Jersey Central filed its Notice of Appeal to the United States Supreme Court.

ARGUMENT

The Appellate Division of the Superior Court of New Jersey properly upheld the exclusion of TMI from appellant's rate base as no longer "used and useful" in the public service and no substantial constitutional question having been presented, this Court should dismiss the appeal or summarily affirm the ruling below.

Despite Jersey Central's attempt to portray the decision below as being in substantial conflict with precedents of this Court and the Fifth and Fourteenth Amendments to the United States Constitution, the Appellate Division's decision is clearly in complete conformity with this Court's pronouncements in the area of public utility ratemaking. One of the most fundamental principles of utility regulation, first enunciated by this Court in *Smyth v. Ames*, 169 U.S. 466 (1898), is that a public utility is entitled to earn a reasonable return on the value of property it devotes to providing service to the public. Such property is commonly referred to as a utility's rate base and is described as property "used and useful" in the public service. It is well-settled that a rate based upon property not used and useful in providing service or on an excessive valuation of property in service, constitutes an extortionate charge. See *Denver Union Stock Yard Co. v. United States*, 304 U.S. 591 (1944); *St. Joseph Stock Yard Co. v. United States*, 298 U.S. 38, 56 (1936).

The "used and useful" principle of rate base determination has withstood all challenges and has remained a cornerstone of state and federal regulatory practice for over eighty years. In *Public Service Transport v. State*, 5 N.J. 196, 74 A.2d 580 (1950), one of New Jersey's landmark utility law cases, Chief Justice Arthur T. Vanderbilt described the rate base determination as "fundamental

in any rate proceeding" and defined rate base as "property of the public utility that is used and useful in the public service". 5 N.J. at 217, 74 A.2d at 591. See also, *Atlantic City Sewerage v. Board of Public Utility Commissioners*, 128 N.J.L. 359, 26 A.2d 71 (Sup. Ct. 1942); *In re New Jersey Power & Light Co.*, 9 N.J. 498, 89 A.2d 26 (1952); *State v. New Jersey Bell Telephone*, 30 N.J. 16, 29, 152 A.2d 35 (1959); *In re Intrastate Industrial Sand Rates*, 66 N.J. 12, 327 A.2d 427 (1974). The Appellate Division decision challenged herein by Jersey Central does no more than uphold the Board's application of the "used and useful" principle to TMI. The record reviewed by the Appellate Division overwhelmingly demonstrated that both TMI-1 and TMI-2 would be out-of-service for an indefinite period of time and that ever-increasing replacement energy costs would have to be passed on to ratepayers. With specific reference to the undamaged TMI-1 unit, Jersey Central consistently failed to project with any degree of certainty when, if ever, such unit would resume operation. Given the unprecedented nature of the TMI outage, the inability to project a TMI return-to-service date, and the imposition of replacement energy costs upon ratepayers, the Board properly removed TMI from Jersey Central's rate base and the Appellate Division correctly affirmed that decision.

Although the Board recognized the necessity of removing TMI from rate base, it was not unmindful of the financial impact such action would have upon Jersey Central's investors. The Board carefully allocated TMI-related losses among ratepayers and investors. The removal of TMI-2 from rate base was done simultaneously with the passing on of replacement energy costs to ratepayers. The removal of TMI-1 was accompanied by a Board directive accelerating recovery of Jersey Central's deferred energy balance in an amount sufficient to offset any adverse im-

fact upon the company's cash flow. Moreover, when the Public Advocate, on behalf of Jersey Central's ratepayers, demanded a moratorium on all rate relief pending a Board inquiry into TMI culpability, the Board rejected such demands, citing the removal of TMI from rate base as adequate assurance that ratepayers would carry no more than their fair share of TMI-related costs. Similarly, over objections from the public, the Board permitted a pass-through of TMI-2 clean-up related costs to ratepayers in the hopes of hastening a TMI return-to-service (JCA-98).

In view of the above, Jersey Central's insistence upon full recognition of TMI in rate base or, in the alternative a compensatory rate-of-return offsetting the TMI exclusion, demonstrates beyond any doubt that Jersey Central does not want to balance consumer and investor interests but wishes to transfer all costs associated with the TMI accident to ratepayers. It is therefore ironic that in its attempt to transform what is simply a question of TMI's "used and useful" status into a substantial constitutional issue warranting review by this Court, Jersey Central invokes *Federal Power Com. v. Hope Natural Gas Co.*, *supra*. *Hope* endorses the very balancing process by which the Board has arrived at all of its TMI-related determinations. Contrary to Jersey Central's apparent belief, *Hope* does not require that ratepayer interests be subordinated to investor demands, but rather, that such competing interests be weighed in the ratemaking process. Three investor interests which should be considered by a regulator in arriving at a "just and reasonable" rate are identified in *Hope*. These investor interests are (1) that the company have sufficient revenue for operating and capital costs; (2) that the return on equity be commensurate with returns on similar enterprises, and (3) that the company be able to maintain credit and attract capital. 320 U.S. at 603. That these investor interests be fully satisfied,

however, is nowhere described as constitutionally mandated in either *Hope* or any subsequent decision by this Court. As the Appellate Division correctly pointed out in rejecting Jersey Central's "constitutional" arguments, the three *Hope* investor interests are not of constitutional dimension nor are they the only factors to be considered by the Board in arriving at a "just and reasonable" rate. All that *Hope* and its progeny require is that investor interests be appropriately balanced against the ratepayers' interest in non-exploitative rates. 320 U.S. at 603. The very use of the word "balance" in *Hope* indicates that neither investor nor ratepayer expectations will be fully met in arriving at a constitutionally "just and reasonable" rate.

Moreover, *Hope* does not require a utility regulator to guarantee a utility a profit nor permit an inflated rate of return to insulate the utility from hardships occasioned by the operation of economic forces. This should be clear from a reading of *Market Street Railway Co. v. Railroad Comm. of Cal.*, 324 U.S. 548 (1945), decided by this Court one year after the *Hope* decision. In *Market Street*, this Court stated:

... the due process clause has been applied to prevent government destruction of existing economic values. *It has not and cannot be used to insure values or to restore values that have been lost by the operation of economic forces.*

The owners of a property dedicated to the public service cannot be said to suffer injury if a rate is fixed ... which probably will produce a fair return on the present fair value of their property. *If it has lost all value except salvage, they suffer no loss if they earn a return on salvage value.* 324 U.S. at 567 [emphasis added].

It is "restoration" of lost TMI value that Jersey Central seeks to achieve by means of either a premature return of TMI to rate base or an inflated rate of return on the remainder of property it has dedicated to the public use. As this Court said in *Market Street*:

(T)he due process clause never has been held by this Court to require a commission to fix rates . . . on an investment after it has vanished . . . 324 U.S. 548.

Jersey Central's strained interpretation of *Hope* is further complicated by its belief that so long as the inclusion of TMI in rate base or, in the alternative the allowance of a compensatory rate of return, will result in rates no higher than those of neighboring utilities, such rates will not exploit customers. The test for exploitation, however, is not the meaningless comparison presented by Jersey Central, but rather, whether rates are based upon property "used and useful" in the public service. Both the Board and the Appellate Division, therefore properly rejected Jersey Central's arguments.

That investor concerns were in fact taken into consideration by the Board in reaching its rate base and rate-of-return determinations is obvious from even the most cursory review of the record below. In the Board's July 31, 1981 Order, for example, the Board specifically referred to the "extraordinary events associated with Three Mile Island and their financial impact on the Company" which "further complicates the measurement of an appropriate rate-of-return (JCA-76). The "regulatory problems and uncertainties" confronting Jersey Central were also noted by the Board, along with a recitation of recent Board efforts to minimize the risks associated with various federal regulatory actions (JCA-77). In rejecting as too

low the Public Advocate's recommended 13.5% to 14.34% return on equity, the Board emphasized the need to reflect in the rate-of-return "present and prospective risks" and "capital market realities". A return on equity of 15% was described by the Board as the "highest ever granted a New Jersey utility" and was found to be an adequate reflection of investor concerns (JCA-77, JCA-81).

Similarly, in the Board's July 22, 1982 rate order, Jersey Central's limited access to traditional money and capital markets was acknowledged, as was the need to deal with Jersey Central's financial problems in a consistent and realistic way. The Board rejected the Public Advocate's recommended return on equity of 14.84% to 15.69% as inadequate and awarded Jersey Central a 17% return on equity. Referring to a recent decision in which it had awarded another utility a 16% return on equity, the Board described its award of a 17% return on equity as reflective of the "unrebuttable higher risk" faced by Jersey Central (JCA-93 to JCA-95).

In summary, therefore, investor concerns were part of the Board's rate-of-return deliberations and, as required by *Hope*, were "balanced" against the ratepayer's interest in avoiding exploitative rates. Jersey Central may not be happy with the Board's "*Hope*" balance of investor and consumer interests, but its mere dissatisfaction with the exercise of the Board's expert ratemaking judgment and the Appellate Division's affirmance of that judgment does not give rise to a substantial constitutional question calling for review by this Court. It is well-settled that, in the absence of a clear conflict with some specific federal constitutional prohibition or federal law, courts will not substitute their social and economic judgments for those of the expert bodies to whom such matters have been entrusted. *Ferguson v. Skrupa*, 372 U.S. 726 (1963). For such reasons, Jersey Central's appeal should be dismissed or, in the alternative, the decision below should be summarily affirmed.

CONCLUSION

It is respectfully urged that for the foregoing reasons, the appeal should be dismissed or, in the alternative, the decision below should be affirmed.

Respectfully submitted,

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